



November 15, 1999

Mr. John Steiner
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR99-3249

Dear Mr. Steiner:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 128090.

The City of Austin (the "city") received a request for "billing and consumptive history" for a number of specified Austin Energy customer accounts. In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.104 and 552.110 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

As a preface to our discussion of the claimed exceptions, we note that section 182.052(a) of the Utility Code, pertains to the confidentiality of certain information of customers of a government-operated utility.² In general, section 182.052 deems confidential "personal

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²"Government-operated utility" means a governmental body or an entity governed by a governmental body that, for compensation provides water, wastewater, sewer, gas, garbage, electricity, or drainage service." Utilities Code §182.051(3).

information” in a customer’s account records if the customer requests that this information be kept confidential. *See* Open Records Decision No. 625 (1994) (interpreting predecessor provision, V.T.C.S. article 1446h).³

In Open Records Decision No. 625 (1994), this office determined that the predecessor to section 182.052, provides confidentiality only for information relating to natural persons; it does not protect the information of entities such as corporations, partnerships, or other business associations. Open Records Decision No. 625 at 3-4 (1994). Therefore, to the extent the requested customer information consists of “personal information” relating to a natural person who has requested that the city maintain the information as confidential, the city must withhold such information from public disclosure pursuant to section 182.052. However, section 182.052 does not prohibit a government-operated utility from releasing information concerning a business to a particular requestor.

Based on the requested information and the submitted records, we assume that only commercial or business, non-residential, customer account information is at issue. We have not construed section 182.052 to deem information about a non-residential customer of a government-operated utility open for all purposes, without regard to the Public Information Act. *Id.* Rather, we believe such information is subject to the act. Therefore, we will next consider the claimed exceptions for the responsive information concerning the specified non-residential customers.

Turning to the exceptions you raise, we will begin by discussing section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” In Open Records Decision No. 593 (1991), this office determined that certain situations may exist in which a governmental body properly may be deemed a “competitor” for purposes of section 552.104. In that decision, we concluded that “[w]here competition is authorized by law, we believe that a governmental body must be afforded the right to claim the ‘competitive advantage’ aspect” of section 552.104. *Id.* at 4. Furthermore, the decision concluded that a governmental body must demonstrate that release of requested information could cause specific harm to that body’s legitimate marketplace interests. *Id.* at 9.

In regard to whether the city has statutorily authorized, legitimate marketplace interests, we note that municipalities are authorized by statute to own and operate utilities. Section 402.001(b) of the Local Government Code authorizes a municipality to “purchase, construct,

³“Personal information means an individual’s address, telephone number, or social security number.” Utilities Code §182.051(4). Information that is not “personal information” as defined in Utilities Code section 182.051(4) is not covered by section 182.052 and must be released. Section 182.054 of the Utilities Code, which does not appear to apply to this request, provides exceptions to the confidentiality of personal information in a customer’s account record for certain entities.

or operate a utility system⁴ inside or outside the municipal boundaries” (Footnote added.) In addition, section 402.001(c) authorizes a municipality to extend the lines of its utility system outside the municipal boundaries and to sell electric services, among other services, to any person outside the municipal boundaries. Section 402.002 provides similarly for home-rule municipalities. *See also* V.T.C.S. art. 1111 (empowering “cities and towns including Home Rule Cities operating under this title . . . to build and purchase, to mortgage and encumber their light systems”).

In accordance with article I, section 26 of the Texas Constitution, Texas courts long have recognized that a municipal utility may compete with other utility companies to provide utility services within a certain area. *See City of Mason v. West Tex. Utils. Co.*, 237 S.W.2d 273, 279 (Tex. 1951). Furthermore, section 2.252(b) of the Public Utility Regulatory Act of 1995, expressly contemplates that more than one retail public utility⁵ may offer retail public utility service to any one geographic area. Accordingly, we conclude that a municipal utility is specifically authorized by statute to engage in competition. Thus, a municipal utility has legitimate marketplace interests that it may seek to protect under section 552.104 of the Government Code.

You contend that section 402.001 and the city Charter authorize the sale of a variety of products and services by Austin Energy related to electric service. You further argue that city through Ordinance 980531-C has “approved the sale of these products and services by Austin Energy.” Based on the submitted information, we conclude that you have demonstrated that the city has a market place interest in electric products and services, and may be considered a “competitor” in this area for purposes of section 552.104. *See* Open Records Decision No. 593 at 4 (1991).

We next consider whether the city has demonstrated that release of the requested information may cause specific harm to the city’s legitimate marketplace interests. You state, “[t]he Council, . . . , specifically found that providing electric products and services at competition-based pricing was necessary to ensure the continued success and value of the City’s electric utility at a time when the electric utility industry is has [sic] already become competitive in various area.” You also state, “Austin Energy offers a variety of energy products and services related to the provision of electric services that are comparable to those that private

⁴Section 402.001(a) of the Local Government Code defines “utility system” to include an electricity system.

⁵Section 2.251 of the Public Utility Regulatory Act of 1995, Act of March 29, 1995, 74th Leg., R.S., ch. 9, 1995 Tex. Sess. Law Serv. 31, 60, defines “retail public utility” for purposes of subtitle F of the Public Utility Regulatory Act of 1995 as “any person, corporation, municipality, political subdivision or agency, or cooperative corporation, now or hereafter operating, maintaining, or controlling in Texas facilities for providing retail public utility service.” *See id.* § 1.003(6), (7), (12), (defining “cooperative corporation,” “corporation,” and “person” for purposes of the Public Utility Regulatory Act of 1995).

energy services companies offer.” In addition, the city has informed us that

Local contractors, subcontractors, investor-owned utilities’ unregulated energy service company affiliates, and other energy service companies are active in this market. In the Austin area alone, there are at least ten large energy service companies and numerous large HVAC and controls contractors and large lighting contractors who perform comprehensive design engineering work and provide installation of systems and maintenance services. Since these companies are offering products and services similar to Austin Energy’s, Austin Energy must compete with these companies on a continuing basis.

Moreover, the city claims that, “[w]ithout customers, Austin Energy’s sales will fail, resulting in losses,” consequently the cost of service increases.

We understand that non-residential customers form a lucrative portion of a utility company’s business. For that reason, a utility’s nonresidential customers are frequently sought by competing electric utility companies. See Richard J. Rudden & Robert Hornick, *Electric Utilities in the Future*, 132 FORTNIGHTLY 21, 22 (May 1, 1994). Additionally, a “city is entitled to make a reasonable profit from its own utility system.” *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976) (citing *South Tex. Public Serv. Co. v. Jahn*, 7 S.W.2d 942 (Tex. Civ. App. 1928, writ ref’d). Loss of its non-residential customers may reduce the profit the city expects to receive from the municipal utility.

Release of the requested information would allow competitors of the city’s utility to identify and solicit a municipal utility’s customers. We believe the city has demonstrated that release of the requested information may cause specific harm to the city’s legitimate marketplace interests. In our opinion, however, the city has demonstrated that release of the information may specifically harm the city only to the extent the information involves customers in areas served by multiple utility companies. We find the city has shown no competitive interest in withholding information related to non-residential customers who are located in areas served only by the city. We, therefore, conclude that section 552.104 of the Government Code authorizes the city to withhold from the requestors the requested information, to the extent it relates to customers located in areas not served exclusively by the city’s utility company.

As we resolve your request under section 552.104, we need not consider whether any of section 552.101 or section 552.110⁶ authorize the city to withhold the requested information.

⁶See generally Open Records Decision Nos. 494 (1988) (customer lists may be withheld only if they meet six criteria of the Restatement of Torts and federal authority indicates that customer lists do not ordinarily constitute trade secrets), 309 (1982) (reach of section 552.110 is no greater than that afforded by section 552.101), 233 (1980).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive, flowing style. The first letter "S" is large and loops around the word "Sam". The last letter "d" also has a large loop that extends under the word "Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/ljp

Ref.: ID# 128090

Encl. Submitted documents

cc: Ms. Judy Keystone
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